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FCC TELECOMMUNICATIONS MARKET ACCESS REGULATION
AUSTRALIAN COMMENTS

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In discussions between the Australian Minister for Communications and the Arts, the Hon Michael Lee MP, and the US delegation at the Seoul APEC Ministerial Meeting in June 1995, the Deputy Secretary of the US Department of Commerce, Mr Barram, invited Australia to submit comments on:

- 1) the Notice of Proposed Rulemaking currently under consideration by the US FCC concerning market entry and regulation of foreign-affiliated entities; and
- 2) the FCC's current requirement for a demonstration of equivalent resale market opportunities in the home markets of foreign service providers wishing to supply services to the US over resold interconnected private lines

The Australian Department of Communications and the Arts (DOCA) submits the following comments.

FCC Notice of Proposed Rulemaking

1. DOCA supports the FCC's basic goals as set out in paragraph 26 of the Notice
 - 1) To promote effective competition in the global market for communications services;
 - 2) To prevent anticompetitive conduct in the provision of international services or facilities; and
 - 3) - To encourage foreign governments to open their communications
2. However, DOCA is concerned that requiring a demonstration of equivalent or effective market access to obtain US telecommunications market entry would fail to achieve the FCC's first and third goals encouraging competition and liberalisation of other markets
3. First, it would fail to encourage foreign governments to open their markets because an equivalent market access hurdle fails to take into account the different paths taken towards liberalisation and the likelihood that liberalisation will occur progressively, as has been the experience in both the US and Australia

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4. For example, the US has a partly liberalised telecommunications regulatory regime in place reflecting its own particular market and government/regulatory factors. The US retains some local monopolies, restricts foreign ownership of radio licences, restricts the scope of communications businesses (ie telecommunications carriers providing cable TV) and includes onerous regulatory processes which are effective market access barriers - such as the FCC resale market equivalence requirement. As priorities and circumstances vary from country to country, so too will the regulatory approaches adopted to achieve liberalisation.
5. The proposed effective market access barrier does not mesh well with our experience that many governments liberalise their telecommunications markets in a progressive and measured fashion. To access the US market, foreign governments would need to accelerate liberalisation to equate with US arrangements, which have evolved over more than 20 years, or even make the transition in a single step. In our view this would set the hurdle too high to provide encouragement to liberalise. Foreign governments who commenced transitional market liberalisation, such as allowing service provider competition or increased foreign investment, but still do not satisfy the proposed effective market access test, would receive no comparable market entry opportunities in the US.
6. Second, as the policy is unlikely to encourage liberalisation, competition in the global market for telecommunications would be restricted. Some market players outside the US would be denied access to one of the world's largest and most sophisticated markets. This could reduce the number of effective global competitors - perhaps encouraging the development of 3-5 dominant global players.
7. DOCA considers that AT&T's proposed "comparable market access" standard would be counterproductive and is undesirable. The two year period may be too short to allow flexibility for governments to liberalise in a measured and progressive way.
8. Furthermore, the range of market access conditions which AT&T wishes to impose where a foreign carrier can discriminate against a US-based carrier appear to be excessive and out of proportion to the potential harm that could be done to a US carrier.
 - The harm caused by the "ability to discriminate" is only a possibility - a potential to do harm where the discrimination is anti-competitive. To deny market access when discrimination does not occur would achieve no competition benefits for telecommunications users. Australia's regulatory regime deals with the potential for unfair market practices such as discriminatory treatment by providing oversight powers to the independent regulatory authority (AUSTEL) to intervene if such discrimination is shown to be against the public interest. To date this has not occurred.

- 9 In paragraph 40 of the Notice, the FCC proposes that one of the criteria used to determine effective market access would be the availability of published, non-discriminatory charges, terms and conditions for interconnection to foreign carriers' facilities for termination and origination of international services
- 10 On the question of international services, Australia has proposed at the WTO Negotiating Group on Basic Telecommunications (NGBT) that trade in termination services be subject to General Agreement on Trade in Services disciplines including transparency and non-discrimination. But such an approach would only apply to government "measures" as defined by the GATS and perhaps to the actions of monopoly or exclusive service providers under Article VIII of the GATS. While published accounting rates are not a requirement under Australian telecommunications law, AUSTEL has recently proposed that carriers be required to make their accounting rate information publicly available. The Government is considering this matter further.
11. DOCA agrees with the FCC's statement in paragraph 42 of the Notice that it does not consider it necessary to adopt AT&T's request for cost-based accounting rates as a condition of foreign carrier entry. This issue could be expected to be resolved by competition and market access, but only if there are no government imposed measures such as parallel accounting rates, proportionate return or restrictions on the type of service providers able to exchange international traffic (such as a condition that they be Recognised Operating Agencies of the ITU). Pending the development of global competition, Australia supports appropriate transitional measures to ensure that telecommunications termination services are traded in a non-discriminatory and transparent manner. The FCC could note that progress on accounting rates could be achieved multi-laterally through the World Trade Organisation Negotiating Group on Basic Telecommunications, and perhaps the ITU-T Study Group 3.
12. The FCC states in paragraph 45 of the Notice that once the proposed effective market access element of the public interest analysis were completed, other public interest factors would be assessed. DOCA is concerned that the additional assessment is so wide-ranging in scope that in practice it is likely to constitute a market access barrier in itself. One of the proposed public interest factors is the status of the foreign carrier as a government or non-government owned entity. Australia's Telstra Corporation, which is 100 percent government-owned, is a fully competitive and commercially-oriented enterprise. It is unclear from the Notice how the ownership status of an operator such as Telstra would impact on the US public interest.

International Resale Order

- 13 Under paragraph 77 of the Notice, the FCC has invited comment on whether the equivalence requirement established by the International Resale Order should conform with the proposed effective market access standard.
- 14 Australia permits full and open competition in the provision of international resale in accordance with AUSTEL's International Service Providers Class Licence (ISPCL), and does not require a demonstration of equivalent market access. US firms already have international resale opportunities in the Australian market which, under the International Resale Order, are not available to Australian firms in the US.
- 15 The development of international resale services is important for placing downward pressure on international accounting rates, which are frequently 4 to 10 times above cost. Even over routes with competition at each end, accounting rates remain high. Reducing the cost of international telephony would provide benefits to consumers, encourage improved operator efficiency and contribute to a reduction in national telecommunications trade outpayments.
- 16 Consequently, DOCA considers that as an important and distinct segment of the telecommunications market, determination by the FCC of equivalent international resale market opportunities should not be linked to wider and largely unrelated market access opportunities in foreign countries.
- 17 DOCA also considers the existing FCC international resale equivalence test may be counterproductive to encouraging competition. The requirement seems onerous in the light of the benefits of fostering service provider competition between liberal countries such as Australia and the US, which both allow international simple resale. Restricting resale opportunities between our two countries because of differences in regulatory approaches - such as domestic interconnection arrangements - will produce no economic and consumer benefits.
- 18 The Australian Government is currently reviewing arrangements applying to the telecommunications sector, including access and interconnection arrangements now applying to carriers and service providers, pending the transition to full and open competition in 1997. Development of competition and regulatory principles for internationally traded telecommunications services can also be appropriately progressed multilaterally in bodies such as the WTO NGBT, APEC, ITU and the OECD.

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